

1 HONORABLE JAMES L. ROBART
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 OLD REPUBLIC TITLE, LTD.,

No. 10-cv-00038-JLR

11 Plaintiff,

MOTION RE: JURY TRIAL

12 v.

13 NOTE ON MOTION CALENDAR:
14 April 29, 2011

TROY X. KELLEY and DIANE
DUFFRIN KELLEY, individually and as
a marital community; BLACKSTONE
INTERNATIONAL, a Nevada
corporation; and BERKELEY UNITED,
LLC, a Nevada Corporation,

15 Defendants.

16 **Introduction and Relief Requested:** Because a timely jury demand was
17 not made and leave of court was not requested to extend the deadline, Plaintiff
18 Old Republic requests a ruling whether this case will be tried before the court or a
19 jury. Because of the significant additional expense involved in a jury trial and in
20 light of the pending summary judgment motions, Old Republic no longer requests
21 a jury. Defendants decline to consent to withdraw the jury demand.

22 **Facts:** When the present lawsuit was filed in King County Superior Court
23 on December 10, 2009, Old Republic did not request a jury trial. Defendants
24 Kelley removed the lawsuit to federal court on January 6, 2010. (Dkt. 1)
25 Following removal, on January 7, 2010, the Court Clerk, Bruce Rifkin, sent a letter
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1 to counsel stating, in part, "Your attention is directed to the provisions of Rule
 2 38(b) and 81(c) of the Federal Rules of Civil Procedure, pertaining to the filing of
 3 demands for trial by jury in Federal Court." (Dkt. 2) Kelley filed his Answer on
 4 January 8, 2010, without requesting a jury. (Dkt. 3) On March 2, 2010, Old
 5 Republic filed a separate Jury Demand. (Dkt. 5)

6 **Authority:** Civil Rule 38(b) and (d) provide:

7 (b) Demand.

8 On any issue triable of right by a jury, a party may demand a jury
 9 trial by:

10 (1) serving the other parties with a written demand — which
 11 may be included in a pleading — no later than 14 days after the
 12 last pleading directed to the issue is served; and

13 (2) filing the demand in accordance with Rule 5(d).

14 * * *

15 (d) Waiver; Withdrawal.

16 A party waives a jury trial unless its demand is properly served and
 17 filed. A proper demand may be withdrawn only if the parties
 18 consent.

19 In the Western District of Washington, Local Rule 38(b) provides that to
 20 request a jury, "the words 'JURY DEMAND' shall be typed in capital letters on the
 21 first page immediately below the name of the pleading to the right o the name of
 22 the cause." This was not done by either party.

23 Rule 81(c)(3) does not change the deadlines above because neither the
 24 defendants' Answer nor any jury demand were filed in state court before the
 25 lawsuit was removed. Lutz v. Glendale Union High School, 403 F.3d 1061, 1063
 26 (9th Cir. 2005); see also 9 Wright & Miller, Federal Practice and Procedure, § 2318
 (Rule 81(c)(3)(B) "applies only if all the necessary pleadings have been served in
 the state court proceeding prior to removal. If they have not, the usual provisions

1 of the Federal Rules, particularly Rule 38(b) and Rule 81(c)(3)(A) govern the time
2 in which to demand a jury.").

3 The trial court has limited discretion to allow an untimely jury demand:

4 Although the right to a jury trial is a constitutional one, the
5 Federal Rules of Civil Procedure, which set out time limits for
invoking this right, are authoritative. A court's exercise of discretion
in denying a motion for a jury trial, based on these rules, does not
impinge upon a party's constitutional rights. See Pacific Queen
Fisheries v. Symes, 307 F.2d 700, 718-719 (9th Cir. 1962), cert.
denied, 372 U.S. 907, 83 S.Ct. 721, 9 L.Ed.2d 717 (1963).
Moreover an "untimely requests for a jury trial must be denied
unless some cause beyond mere inadvertence is shown."
Mardesich v. Marciel, 538 F.2d 848, 849 (9th Cir. 1976) (per
curiam); Galella v. Onassis, 487 F.2d 986, 989 (2d Cir. 1973).

10 Chandler Supply Co. v. GAF Corp., 650 F. 2d 983, 987 (9th Cir. 1980).

11 **Conclusion:** Old Republic filed an untimely jury demand without leave of
12 court. The foregoing motion is submitted to determine whether the case will be
13 tried to the court or a jury. Given the issues in the case, the pending summary
14 judgment motions, and to avoid the additional time and expense involved in a jury
15 trial, Old Republic no longer requests a jury trial.

16 DATED this 14th day of April, 2011.

17 /s/Scott A. Smith
18 Scott A. Smith, WSBA #11975
19 William P. Brewer, WSBA #37055
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22 Attorneys for Plaintiff
23 Old Republic Title, Ltd.
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CERTIFICATE OF SERVICE

I, Melodi Downs, states as follows:

I am over 18 years of age and a citizen of the United States. I am employed as an executive assistant by the law firm of Riddell Williams P.S.

On the date noted below I electronically filed the foregoing pleading using the CM/ECF system and caused to be delivered true and accurate copies of the same via the CM/ECF system which will send notification of such filing to:

Judy A. Endejan, WSBA #11016
David C. Lundsgaard, WSBA #25448
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this Certificate of Service was executed on this 14th day of April, 2011, at Seattle, Washington.

Melodi Downs
Melodi Downs